Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of	)	MB Docket No. 05-255
Competition in the Market for the	)	
Delivery of Video Programming	)	

COMMENTS OF SBC COMMUNICATIONS, INC.

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SBC Communications, Inc. ("SBC") respectfully submits these comments pursuant to the Commission's Notice of Inquiry ("Notice") in this proceeding.

SUMMARY

The Commission's Notice in this annual inquiry raises a wide range of important questions concerning the present state of competition in various video markets. As a new entrant in the video marketplace that is currently deploying fiber networks designed to provide a suite of IP-enabled services and compete with the video and other offerings of cable incumbents within its 13-state region, SBC addresses five of these questions in these comments:

First, the Commission should recognize that the current market for the acquisition and distribution of video services continues to be one in which new entrants, including DBS operators, have made limited inroads in competing against the incumbent cable operators. This conclusion is evidenced by continued increases in incumbent cable subscriber rates without regard to the attractiveness of their offerings, by recent market surveys showing significantly lower value and service quality ratings for cable offerings than for competitive telephone services, and — most significantly — by GAO findings that cable rates are significantly lower in the presence of a wire-based competitor.

Second, through its new Project Lightspeed, SBC is now poised to provide in its region precisely the kind of wireline video competition that has been proven to restrain cable pricing and enhance cable service quality and offerings. This new IP-based network is designed to transform the video marketplace by integrating video and other services in a highly interactive suite of IP-enabled service offerings that can enable subscribers to customize their viewing experiences in unprecedented ways.

Third, the Commission should recognize that there is one clear barrier to entry that currently threatens to derail the potential of Project Lightspeed and similar efforts to provide video programming in competition with cable incumbents: the prospect of having to negotiate and obtain literally thousands of franchises, each of which could take months and impose substantial burdens on new entrants. The deterrent effect of such burdens would truly dwarf those posed by state certification requirements for cable provision of voice services, which the Commission has previously determined to be unacceptable. Indeed, there is no small irony in the simultaneous efforts of cable incumbents both to ensure that as new entrants into voice markets they are relieved of all of the universal service and other requirements associated with incumbency, and to impose far more onerous incumbent regulations on their new entrant video competitors.

Fourth, as the Commission has suggested in its Notice, and as both the Commission and the cable industry have recognized in other contexts, the traditional justification for franchising authority does not apply in circumstances where the local government already has authority to manage a provider's use of public rights of way, and where the provider's proposed new use has no incremental effect on such rights of way. Indeed, such redundant franchising requirements would raise serious First Amendment problems by restricting the free expression of would-be telco providers of video service in the absence of any governmental interest, much less a substantial one.

Fifth, quite apart from the entry barriers posed by a myriad of widely varying franchise requirements, the Commission should recognize that access to popular regional sports and other video programming remains a troublesome problem for would-be new entrant video providers. As the Commission is aware, this problem is particularly acute where incumbent cable operators refuse to provide such programming to their competitors on nondiscriminatory terms and conditions, or can negotiate exclusive contracts, simply because the programming can be transmitted to them without using a satellite. The Commission has broad authority under the Act to address this festering problem, and should take steps to do so.

DISCUSSION

I. NEW ENTRANTS INTO THE MARKET FOR THE ACQUISITION AND DISTRIBUTION OF VIDEO SERVICES HAVE MADE LIMITED INROADS AGAINST INCUMBENT CABLE OPERATORS.

As in prior years, the Commission's Notice first asks (at ¶¶ 7-8) whether MVPD competition has resulted in lower prices, more programming choices, better service quality, or other consumer benefits, and "whether the effect of competition varies depending upon the nature of the competitors." The evidence is compelling that wireline-based competition provides the most effective stimulus for such consumer benefits but that the promise of such competition remains as yet unfulfilled.

More than twenty years after the Cable Act, and notwithstanding the introduction of DBS service, cable operators' hold is substantial enough that they continue to be able to increase their rates at a steady pace. In fact, their prices have been rising over three times as fast as the Consumer Price Index ("CPI").[1/] And that trend continues: 2005 has already seen another round of price hikes.[2/]

To be sure, the cable industry has consistently sought to blame its rate increases on the costs of acquiring programming and offering more channels. But as the Notice recognizes (at ¶ 7), this response begs the question whether "cable subscribers demand and benefit from these additional channels, even at the cost of higher monthly bills," or whether there is simply no significant market restraint on cable operators' ability to force

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[1/] U.S. General Accounting Office, *Report to the Chairman, Comm. on Commerce, Science, and Transportation, U.S. Senate: Telecommunications, Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, at 20 (Oct. 2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename =d048.pdf&directory=/diskb/wais/data/gao ("2003 GAO Report") (finding that cable rates have increased approximately 40 percent over a five-year period compared to the approximately 12 percent increase in the Consumer Price Index).

[2/] *See, e.g.*, Tony Gnoffo, *Dissecting Comcast's Rate Hikes*, PHILADELPHIA INQUIRER, Mar. 13, 2005, *available at* 2005 WLNR 3875285 (discussing rate hike taking effect in March and noting "[f]or Comcast's customers, rate increases have become an annual affair. Their regularity and steep trajectory — about 6 percent a year since 2001 — have been a sore point."); *Charter to Increase Some Rates Starting Next Month*, KALAMAZOO GAZETTE, Feb. 11, 2005, *available at* http://www.mlive.com/news/kzgazette/index.ssf?/base/news-12/1108138819196880.xml; Greg Edwards, *Comcast Raising Cable Rates*, RICHMOND TIMES-DISPATCH, Dec. 7, 2004 (Comcast has announced rate increases for its Richmond customers ranging from 5.9% to 9.9% for standard analog service); Peter J. Howe, *Comcast Will Raise Cable Rates in January*, BOSTON GLOBE, Nov. 24, 2004; Carolyn Said, *Comcast to Raise Prices by 6 Percent Jan. 1*, SAN FRANCISCO CHRONICLE, Nov. 25, 2004; John Cook, *Comcast Plans to Raise Cable TV Rates*, SEATTLE POST INTELLIGENCER, Nov. 24, 2004.

subscribers to accept such offerings, including those owned by the cable incumbents themselves.

The answer to the Commission's question is suggested by three important facts. First, a recent survey commissioned by the National Consumers League reports that only 49% of cable customers rate their service as a good value, far short of the ratings achieved by the local, long-distance, and wireless telephone providers.[3/] Second, quite apart from price, cable service also lags significantly behind telephony in customer satisfaction with service quality.[4/] Finally, if price hikes were truly attributable to increased programming costs, one would expect them to be consistent. *In fact, cable prices are significantly lower in the presence of a wire-based competitor.* In 2003, the Government Accountability Office ("GAO") found that the rates of cable incumbents facing competition from such a wire-based video provider (not a DBS service) are approximately 15 percent lower.[5/] A 2004 GAO report similarly found that the entry of a broadband service provider offering video service "induce[s] incumbent cable operators to respond by providing more and

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3/ Harris Interactive, *Consumers and Communications Technologies: Current and Future Use*, prepared for the National Consumers League, Final Report, at 40 (June 29, 2005), *available at* http://nclnet.org/research/utilities/telecom_survey_harris.pdf. The corresponding figures for telephony markets were 77% (local), 78% (long distance), and 75% (wireless).

4/ Only 76% of cable customers reported satisfaction with service quality, compared to 92% of local telephone service customers, 90% of long-distance telephone service customers, and 90% of wireless telephone service customers. *Id.*

5/ 2003 GAO Report at 3, 10. *Accord*, Video Choice Act of 2005, S. 1349, 109th Cong., 1st Sess. § 2(3) (2005) (citing GAO finding).

better services and by reducing rates and offering special deals."[6/] The Commission itself has reported that, when a cable operator faces competition, "it responds in a variety of ways, including lowering prices or adding channels without changing the monthly rate, as well as improving customer service and adding new services such as interactive programming."[7/] With the advent of telco fiber deployment and high-speed broadband services, for example, cable providers have now begun to offer increased broadband speeds.[8/]

Congress has attached the highest priority to the widespread deployment and availability of these broadband services, which are defined to include "video" services.[9/] In section 706 of the 1996 Act, it directed that the Commission "encourage the deployment on a reasonable and timely basis" of advanced capabilities, to employ "regulating methods

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6/ U.S. General Accounting Office, Report to the Subcomm. on Antitrust, Competition Policy, and Consumer Rights, Comm. on the Judiciary, U.S. Senate: Telecommunications, Wire-Based Competition Benefited Consumers in Selected Markets, at 12 (Feb. 2004); *see also id.* at 15 (finding that "the monthly rate for cable television service was 41 percent lower compared with the matched market, and in 2 other [broadband service provider] locations, cable rates were more than 30 percent lower when compared with their matched markets").

7/ Tenth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606, 1611-12 ¶ 11 (2004); *see also id.* at 1683 ¶ 127.

8/ *See, e.g.,* Ed Gubbins, *Cable Speeds Close in on FIOS*, TELEPHONY, July 11, 2005, at 12; Marguerite Reardon, *Broadband speed war emerges; Cable providers are increasing speeds as Verizon rolls out its fiber-to-the-home network*, CNET NEWS.COM, July 1, 2005; Doug LeDuc, *Comcast increases broadband speed; As battle with Verizon nears for cable service, company plans change*, FORT WAYNE NEWS SENTINEL, July 19, 2005, at 5.

9/ 47 U.S.C. § 157(c) (defining "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology").

that remove barriers to infrastructure development" in connection therewith, and to "take immediate action to accelerate deployment of such capability by removing [such] barriers" where necessary to ensure such reasonable and timely deployment.[10] And yet it is in this area that the Notice's concerns about barriers to entry (at ¶¶ 10, 56) have the greatest force. As the Commission has previously recognized, the mandate of section 706 requires it to remove regulatory constraints in order to "give incumbent LECs incentives to deploy advanced facilities allowing them to roll out their own triple play of services as cable competitors roll out theirs."[11] And the most substantial of those constraints, discussed below, is the insistence of the cable industry and many franchising authorities that all new entrants must negotiate and obtain literally thousands of incumbent franchise authorizations with varying requirements before they are able to compete with cable incumbents.

II. THROUGH PROJECT LIGHTSPEED, SBC PROMISES TO PROVIDE SIGNIFICANT COMPETITIVE PRESSURE AGAINST THE CABLE INCUMBENTS IN THE PROVISION OF VIDEO SERVICES AND THE TRIPLE PLAY.

In its Notice (at ¶ 55), the Commission also seeks information concerning SBC's proposed IP video offering, known as Project Lightspeed. This is a $5 billion capital project that will enhance the broadband capabilities of SBC's existing communications network. The result, after the initial deployment phase that will include the addition of

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10/ *Id.* §§ 157(a), (b).

11/ Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 19 FCC Rcd 20293, 20299 ¶ 13 & n.45 (2004).

approximately 40,000 miles of fiber to SBC's networks, will be an advanced, IP-enabled broadband network available to approximately 18 million residential customers in SBC's traditional 13-state service territory.

Project Lightspeed will involve both fiber to the node ("FTTN") and fiber to the premises ("FTTP") deployments. In general, FTTN will be used in existing neighborhoods, while FTTP will be used in new developments. In the FTTN configuration, additional fiber will be deployed in SBC's existing network to nodes located within, on average, three thousand (3,000) feet or less of homes. At the node, SBC will connect the new fiber to the existing copper facilities now serving customers. In the FTTP configuration, since no current service or facilities will be in place, fiber will be deployed directly to customer premises. Both FTTN and FTTP configurations will enable an impressive suite of IP-enabled voice, data, and video applications.

The supporting network for Project Lightspeed will fundamentally differ from a traditional cable architecture. A conventional cable system transmits the totality of traditional video programming to all households connected to the system, and it is the tuners built into customers' set-top equipment that select the appropriate channel to display on each customer's televisions. In contrast, Project Lightspeed contemplates a switched, two-way, client server architecture designed to send each subscriber only the programming the subscriber chooses to view at a particular time. This switched system involves regular two-way communication and interaction between individual subscribers and the network. Moreover, because other applications provided over the network will be IP-based, subscribers will be able to tailor and integrate much of the voice, video, and data content.

The Project Lightspeed architecture is designed to place the subscriber at the command center of a sophisticated array of services and content that can be manipulated and individualized to meet the tastes and needs of each individual member of the subscriber's household. Eventually, this interactive two-way capability will allow SBC to offer a service that will enable subscribers to (1) select different camera angles or audio feeds; (2) request additional content of particular interest to them, including "converged" Internet-sourced content that the customer can view and interact with on a real time basis while watching video programming content, such as obtaining sports score updates on screen from a secure network location with Internet-sourced data while a game is in progress; (3) use enhanced "picture-in-picture" and "mosaic" features for simultaneous viewing of multiple video streams; and (4) interact with "triggers" in video streams that would allow customers to vote in news polls and have collated voting data appear on screen in real time.[12/] In addition, because voice, video, and data will be offered over a converged IP-enabled network, each of those services ultimately will work together so that, for instance, an IP-enabled wireless phone could be used to remotely program a Digital Video Recorder ("DVR") or alter parental controls. Project Lightspeed thus promises to provide competition to entrenched cable incumbents, not only in the acquisition and distribution of video programming, but also with respect to the triple play of voice, video, and data services.

12/ SBC takes seriously the rights and interests of content owners. All programming arrangements and service components will, therefore, be a function of arrangements with content owners and applicable copyright protections.

III. THE PROSPECT OF INCUMBENT FRANCHISE REGULATION CONSTITUTES A SIGNIFICANT BARRIER TO ENTRY FOR TELCO NEW ENTRANTS.

As noted above, Project Lightspeed involves a multibillion dollar investment by SBC. Verizon is reported to have similar investment costs of $3 billion for its "FiOS" project.[13/] These staggering sums are necessary in order to retool existing telephone networks to accommodate the kinds of video and other offerings necessary to compete with incumbent cable operators. Yet all of these investments must be made without the assurance of revenue from a single video customer.

In these circumstances, there can be little doubt of the answer to the question posed by the Notice (at ¶ 56), and earlier by Chairman Martin,[14/] as to whether the imposition of incumbent cable franchise requirements would serve as a barrier to entry for telco video providers.[15/] It is the same answer that the Commission provided over 20 years ago when it preempted incumbent franchise regulation for the very first new video entrants: the likely "chilling effect on entrepreneurs who otherwise would enter the pay television

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13/ *See* Jay Sherman, *Telcos Lack Video Numbers*, TELEVISIONWEEK, Apr. 25, 2005, at 3.

14/ *See* Doug Halonen, *Telcos Take Their Case to the Feds; State Regs Hinder Entry to Video-Services Market*, TELEVISION WEEK, June 13, 2005, at 4 ("[l]ocal franchising obligations might impede [telcos'] ability to come in and provide a competitive alternative for video services") (quoting Chairman Martin).

15/ As the Notice recognizes (at ¶ 56), there is currently debate as to whether, and under what circumstances, the Communications Act can be read to require such incumbent franchise requirements for the deployment of new IP-based video networks, particularly in light of the deregulatory mandates of section 230 of the Act and section 706 of the 1996 Act. *Compare* NCTA's "Applicability of Title VI to Telco Provision of Video over IP" (July 2005), *with* SBC's "The Impact and Legal Propriety of Applying Cable Franchise Regulation to IP-Enabled Video Services" (Sept. 14, 2005) (copy attached) (both filed in WC Docket No. 04-36). SBC's comments here are directed, not to this legal question, but rather to the specific factual inquiries relevant to telco video entry posed by the Notice.

market," and "delay in the initiation of service" arising from "aspects of the state regulatory process involving certification or registration and related procedural obligations [would] stand as an obstacle" to the Commission's goal of "encourag[ing] direct competition."[16/]

Indeed, the barriers to a new entrant posed by a myriad of incumbent franchising requirements are far more substantial.[17/] A new video entrant cannot hope to compete with incumbent cable operators until it has a sizeable, region-wide network; otherwise, it will not be able to secure advertising dollars and negotiate reasonable programming contracts — which of course in turn will affect its ability to attract subscribers.[18/] But deployment of a new, region-wide cable network from scratch would involve the negotiation of literally *thousands* of new franchising agreements. For example, SBC's initial Project Lightspeed deployment — reaching 18 million residential customers within three years — encompasses some 2,000 franchise areas. Under normal conditions, the negotiation of

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16/ Memorandum Opinion and Order, Declaratory Ruling and Order, *Earth Satellite Communications, Inc.*, 95 F.C.C.2d 1223, 1233-34 (1983), *aff'd sub nom. New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984).

17/ These thousands of varying and extensive franchising requirements would also dwarf the maximum of 50 state entry and certification requirements for VoIP providers, which the Commission determined to preempt as processes that could "introduc[e] substantial delay in time-to-market." Memorandum Opinion and Order, *Vonage Holdings Corp.*, 19 FCC Rcd 22404, 22416 ¶ 20 (2004).

18/ *See* Jay Sherman, *Telcos Lack Video Numbers; VOD Spirit Is Willing, but Bottom Line, Subs May Be Weak*, TV CURRENTS, Apr. 25, 2005.

each of these franchises can be protracted, taking at least several months to more than a year, thus inevitably making region-wide entry a long-term process.[19]

Even some franchising authorities are now beginning to recognize that "[t]he extensive review and, in some cases, the protracted period for completion of the steps involved in granting a franchise . . . may deter competitive entry rather than promote and facilitate it."[20] The longer the delay, the higher the barrier to entry becomes. The cable incumbents become more entrenched and tie up more subscribers with triple play offerings, and new entrants remain stalled in a cycle where they cannot successfully secure programming or subscribers. In the words of a leading cable analyst, "There's a first-mover advantage, and the cable companies are very aware of this."[21]

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[19] *See, e.g.*, David Koenig, *Big Telcos Frustrated in Bid to Challenge Cable TV Head-On*, ASSOCIATED PRESS, May 31, 2005 (franchise process can take 6 to 18 months); Tom Johnson, *Verizon Rollout Raises Hackles*, NEWARK STAR-LEDGER, Mar. 13, 2005, *available at* 2005 WLNR 3907819; Harry Berkowitz, *Verizon's Cable Dreams: Telephone giant must woo communities one by one for licenses to offer TV services*, NEWSDAY, June 27, 2005, *available at* 2005 WLNR 10173524 (representative of cities notes that for some, "[i]t could be a matter of months or it could be a matter of years").

[20] Order Granting Waiver, *Petition of the Town of Clarkstown (Rockland County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service*, Case 05-V-0059, at 3 (N.Y. Pub. Serv. Comm'n May 20, 2005); *see also, e.g.*, Order Granting Waiver, *Petition of the Village of Tarrytown (Westchester County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service*, Case 04-V-1462 (N.Y. Pub. Serv. Comm'n Feb. 9, 2005); Order Granting Waiver, *Petition of the Town of Orangetown (Rockland County) for a Waiver of Certain Provisions of 9 NYCRR Part 594 of the Commission's Rules to Provide Cable Television Service*, Case 04-V-1591 (N.Y. Pub. Serv. Comm'n Mar. 16, 2005).

[21] Sanford Nowline, *SBC is forced to slow down on video services*, SAN ANTONIO EXPRESS-NEWS, June 28, 2005, at 1E, *available at* 2005 WLNR 10211036 (quoting Jeff Kagan).

But delay is by no means the sole or even the principal impediment to competition created by incumbent franchising requirements. Largely set up in an era of monopoly providers of video services,[22] the incumbent franchising laws permit municipal authorities to demand a host of onerous requirements that could radically change the financial calculus for telecommunications carrier network deployment — a calculus based on being the third or fourth video programming distributor in the market. For example, through the franchising process such authorities may impose "requirements for facilities and equipment;"[23] require the dedication of capacity on any "institutional network" for the benefit of the municipality;[24] set unspecified "construction-related requirements;"[25] and impose build-out requirements and schedules that may be especially difficult for a new entrant to meet before it has begun to attract consumers and earn revenues. These requirements are completely unnecessary with respect to new entrants. Municipalities should not, to take one example, need capacity on a duplicative institutional network. In addition, such requirements significantly increase costs and risks for a prospective entrant.

22/ This origin of a franchise requirement in the context of de jure or de facto monopoly cable service explains why, though they threaten to deter entry to competitive providers, such franchises did not serve as entry barriers to incumbents. They had the entire market to themselves. And they did not have (or need) regionwide footprints. As Comcast and Time Warner recently put it, "cable originated as an extremely fragmented service, the result of balkanized applications by numerous companies for tens of thousands of separate local cable franchises in the 1960s and 1970s." Applications and Public Interest Statement of Adelphia Communications Corp. et al., Applications for Consent to the Assignment and/or Transfer of Control of Licenses, filed in MB Docket No. 05-192, May 18, 2005, at 68.

23/ 47 U.S.C. § 544(b)(1).

24/ *Id.* §§ 541(b)(3)(D), 531(b).

25/ *Id.* § 552(a)(2).

For example, in the voice context, the Commission has determined that build-out requirements are "prohibitively expensive" and "impact the threshold question of whether a potential competitor will enter . . . at all."[26/] As a recent study found, build-out rules thus "may in the end do more harm than good" in the promotion of video competition.[27/]

On top of all that, franchising obligations may differ from jurisdiction to jurisdiction, making it not only enormously expensive but entirely impractical for new entrants to quickly build out a region-wide network. As Representative Markey observed in the early stages of the drafting of the 1996 Act, "[t]o require telephone companies to restructure their networks in order to respond to each community's requirements would effectively balkanize today's regional networks, raising costs to consumers and delaying the arrival of new, advanced services."[28/] Addressing the difficulties of having to comply with fifty different state requirements, Commissioner Abernathy has raised essentially the same concern: "How can new entrants introduce services nationally when they have to navigate a maze of different and potentially inconsistent state regulatory requirements, ranging from entry regulations, tariffing requirements, network reliability rules, and so forth?"[29/]

26/ *Public Util. Comm'n of Texas*, 13 FCC Rcd 3460 ¶¶ 13, 78, 81, 95 (1997), *aff'd on review of other issues sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999).

27/ George S. Ford *et al.*, *Phoenix Center Policy Paper Number 22: The Consumer Welfare Cost of Cable "Build-out" Rules*, PHOENIX CENTER POLICY PAPER SERIES, at 10 (July 2005).

28/ 140 CONG. REC. 5204, 5240 (1994).

29/ Kathleen Abernathy, *From VOIP to EOIP: Implications for Policymakers*, National Summit on Broadband Deployment, at 5 (Oct. 25, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253718A1.doc.

This problem is magnified exponentially when a provider is faced with potentially thousands of different local requirements. Indeed, as Senator Ensign recently put it: "[I]t makes no sense having 30,000 local cable-franchise authorities continuing to issue video franchises as if they were in a monopoly situation."[30/] Any application of legacy cable franchising obligations to telco new entrants thus would be a major barrier to the deployment of their video facilities. As Senator Stevens has observed, this process is not only "very costly." It could "really ultimately kill competition."[31/]

IV. SUCH INCUMBENT FRANCHISE REQUIREMENTS WOULD ALSO BE UNNECESSARY GIVEN EXISTING AUTHORITY TO MANAGE TELCO USE OF PUBLIC RIGHTS OF WAY.

The Notice also raises the question (at ¶ 56) whether incumbent franchising regulation of telco new entrants would be unnecessary in light of existing authority to manage public rights of way. The Commission concluded in its pre-1996 Act decision to permit telcos to provide "video dialtone" service without local franchise requirements, because "[i]n contrast to cable operators, local telephone companies already receive authorization to use the public rights-of-way pursuant to common carrier regulation." It thus refused to "infer that Congress intended that local telephone companies secure a cable

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30/ Ted Hearn, *Ensign Backs Bells on Franchising*, MULTICHANNEL NEWS, June 27, 2005.

31/ Remarks at the Federal Communications Bar Association's Annual Meeting at 2 (June 5, 2005). Rep. Boucher has similarly recognized that any such local franchise requirement would constitute a "significant barrier to entry." Rep. Rick Boucher, *What Can Congress Do To Strengthen Telecommunications Laws?*, ROLL CALL, June 6, 2005, *available at* 2005 WLNR 8945386.

television franchise to use the same rights of way they are already authorized to use."[32/] For similar reasons, the Commission also later questioned whether municipalities should be permitted to impose franchising obligations on an OVS provider that "already has a franchise as a telephone company."[33/] And it has tentatively concluded that the same would be true of cable operators' decisions "to use their previously franchised systems to provide cable modem service."[34/] In doing so, the Commission reiterated its "previously expressed concern about unnecessary regulation at the local level that extends far beyond local government interests in managing the public rights-of-way."[35/]

In the case of SBC's proposed IP-enabled video service, the rights of way premise for municipal franchise regulation would be wholly redundant. As the New York Public Service Commission has recently acknowledged,[36/] municipalities (and state governments) *already* closely oversee telecommunications carriers' use of local rights of way when they

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32/ Memorandum Opinion and Order on Reconsideration, *Telephone Company-Cable Television, Cross-Ownership Rules*, 7 FCC Rcd 5069, 5072 (1992), *aff'd sub nom. NCTA v. FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994) (upholding this determination over challenge by NCTA).

33/ Order on Remand, *Implementation of Section 302 of the Telecommunications Act of 1996*, 14 FCC Rcd 19700, 19705 n.29 (1992).

34/ Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4850 ¶ 102 (2002) ("*Cable Modem Order*") (subsequent history omitted).

35/ *Id.* at 4850 ¶ 104.

36/ Joint Petition of the Town of Babylon, the Cable Telecommunications Ass'n of New York, Inc. and CSC Holdings, Inc. for a Declaratory Ruling Concerning Unfranchised Construction of Cable Systems in New York by Verizon Communications, Inc., *Declaratory Ruling on Verizon Communications, Inc.'s Build-out of Its Fiber to the Premises Network*, Cases 05-M-0250, 05-M-0247, at 20-21, 26-27 (N.Y. Pub. Serv. Comm'n June 15, 2005).

use those rights of way to offer telecommunications services and information services. Telecommunications carriers are subject to a host of permitting requirements and rules that dictate how, when, and where they can deploy facilities in the public rights of way and that are designed to protect public safety and welfare.[37] These requirements and rules include the need for permits when seeking to cut pavement or lay fiber or do any other construction, the payment of applicable excavation and right of way management fees, and compliance with public safety and traffic requirements for rights of way projects. As NCTA has argued, "[t]h[e] local layer of regulation makes no sense when . . . new services can be offered simply by changing the pattern of signaling sent over an existing physical transmission facility, without imposing any additional burden of rights-of-way."[38]

Such redundant franchise regulation over use of public rights of way also would raise important First Amendment considerations. The Supreme Court has established that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[39] The same is equally true of other would-be providers of video content to subscribers, as the federal courts uniformly concluded in a series of decisions striking down a (now-repealed) Cable Act ban on the provision of video programming by local telephone companies. Applying the Supreme

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37/ *See, e.g.*, ARK. CODE ANN. § 14-200-101(a)(1)(A) (2004); CITY OF UPPER ARLINGTON, OHIO STREETS AND SERVICES CODE, § 933.03(B) (2004); KAN. STAT. ANN. § 17-1902(d) (2004); OHIO REV. CODE ANN. § 4939.03(C)(1) (2004).

38/ Comments of NCTA, IP-Enabled Services, filed in WC Docket No. 04-36, May 28, 2004, at 21.

39/ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("*Turner I*"); *see also Leathers v. Medlock*, 499 U.S. 439, 444 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

Court's *Turner I* decision, these courts all concluded that such a ban implicated the First Amendment by "prohibiting [common carriers] from directly engaging in this form of speech within a certain area,"[40/] and warranted intermediate scrutiny under *United States v. O'Brien*.[41/]

The *O'Brien* standard permits the government to impose a restriction on speech only "if [the restriction] furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[42/] In order to identify the governmental interest in burdening protected First Amendment activity, courts look closely at the underlying law and its purpose as identified in the legislative history.[43/] Here, those sources make clear that incumbent franchise regulation has always been rooted in municipal governments'

40/ *U S WEST, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated as moot*, 516 U.S. 1155 (1996) (statute violated First Amendment under intermediate scrutiny standard); *see also Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994) (same); *Southern New England Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *Southwestern Bell Corp. v. United States*, Civ. A. No. 3:94-CV-193-D, 1995 WL 444414, at *3 (N.D. Tex. Mar. 27, 1995); *NYNEX Corp. v. United States*, No. 93-323-C, 1994 WL 779761, at *2 (D. Me. Dec. 8, 1994); *BellSouth Corp. v. United States*, 868 F. Supp. 1335, 1344 (N.D. Ala. 1994); *Ameritech Corp. v. United States*, 867 F. Supp. 721, 737 (N.D. Ill.1994).

41/ 391 U.S. 367 (1968).

42/ *O'Brien*, 391 U.S at 376-77; *see also Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

43/ *See, e.g.*, *Turner II*, 520 U.S. at 195-204 (looking to congressional findings concerning the statute in question to determine government interest); *Turner I*, 512 U.S. at 662-63 (examining the congressional history of the regulations in question); *U S WEST*, 48 F.3d at 1101 (turning to congressional findings).

need to regulate and manage the use of public rights of way.[44] Indeed, the Supreme Court has specifically held that the First Amendment analysis of the legality of cable franchising requirements should turn on information about the relevance of the requirement to the would-be-provider's "use of the public utility poles and rights-of-way and how [it] proposes to install and maintain its facilities on them."[45]

No additional government regulatory interest — much less a substantial one — is triggered by the mere fact that some of the packets SBC will transmit over its networks (and the rights of way) will contain video. These networks *already* have the right to use local rights of way, and the transmission of these video packets will involve no additional burden on those rights of way. Imposing additional rights of way regulations for such transmission would thus, as the Notice suggests, not only be "duplicative"[46] and thus wholly unnecessary. It would create significant First Amendment concerns under *O'Brien*.

V. COMPETITIVE MVPD MARKETS WILL NOT EXIST IN THE ABSENCE OF NONDISCRIMINATORY ACCESS TO PROGRAMMING.

The Notice seeks comment (at ¶¶ 17-19) on various issues related to MVPD access to programming. As a prospective MVPD, SBC views program access as critical to the development of a fully competitive video market. New entrants cannot undertake the network investment necessary to deliver video and other advanced services without access

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[44] *See, e.g.*, 47 U.S.C. § 522(7)(B); S. Rep. No. 97-518, at 5 (1982); *see also Cable Modem Order* at 4750 ¶ 104; Memorandum Opinion and Order, *Entertainment Connections, Inc.*, 13 FCC Rcd 14277, 14301, 14307-08 ¶¶ 52, 62-63 (1998) (subsequent history omitted).

[45] *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986) (remanding challenge to exclusive franchising requirement), *on remand*, 13 F.3d 1327, 1330-31 (9th Cir. 1994) (rejecting city's claim of need for such requirement).

[46] *National Cable Television Ass'n*, 33 F.3d at 73.

to quality programming — programming that will actually attract consumers to consider competitive alternatives. This is particularly true with respect to regional programming, including regional sports network (or "RSN") programming. As the Commission has recognized, access to such programming is essential because there are no "readily available substitutes" for RSN programming.[47]

SBC is currently in the midst of negotiations — and hopes it will be able to enter into commercial arrangements — for access to programming. However, a substantial impediment to the development of video competition is the ability and incentive of the cable incumbents to restrict or deny access to such programming to new entrants, a longstanding problem of which the Commission is well aware. As early as 1999, in response to the Commission's video competition notice of inquiry, the Competitive Cable Coalition urged the Commission "to take proactive measures to foster competition in the multichannel video programming distribution ('MVPD') market by eliminating the ability of incumbent cable operators to engage in anticompetitive program access . . . practices."[48] In particular, the Coalition warned:

> When local sports programming is withheld from new competitors, as it increasingly is, it is cold comfort to know that the national market share of incumbent cable companies has declined to a mere 82%. The fact remains that such programming is crucial and, with the Commission's approval, is

[47] Memorandum Opinion and Order, *Application for Transfer of Control, General Motors Corp. and Hughes Elec. Corp., Transferors, and News Corp. Limited, Transferee*, 19 FCC Rcd 473, 543 ¶ 148 (2004) ("*Hughes/News Corp. Merger Order*").

[48] Reply Comments of the Competitive Cable Coalition, filed in Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, at 9 (Sept. 1, 1999).

> widely withheld by the simple device of migrating it to terrestrial distribution.[49/]

That warning was echoed three years later by the Broadband Service Providers Association, which urged the Commission to "address competitive concerns regarding discriminatory and exclusionary conduct involving cable-affiliated, terrestrially-delivered regional sports programming and other such services."[50/]

The Commission itself has "long recognized that the terrestrial distribution of programming — particularly RSN programming — by vertically integrated cable operators could competitively disadvantage competing MVPDs if they were denied access to the terrestrially delivered programming."[51/] But despite such findings, the Commission has determined that it lacks authority to constrain the power of incumbent cable companies to deny or restrict access to regional programming by closing the "terrestrial loophole" of which the cable operators have availed themselves to avoid application of the Commission's exclusivity rules.[52/]

49/ *Id.* at 16.

50/ Comments of the Broadband Service Providers Association, filed in MM Docket No. 92-264, at 3 (2002).

51/ *Hughes/News Corp. Merger Order* at 535 ¶ 133 (citing its own findings in its annual reports on the status of competition in the video market from 1999 through 2002); *see also* Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, 17 FCC Rcd 12124, 12158 ¶ 73 (2002) ("*Sunset Order*") (finding that "that terrestrial distribution of programming could have a substantial impact on the ability of competitive MVPDs to compete in the MVPD market").

52/ *See, e.g.*, *Sunset Order* at 12158 ¶ 73.

Thus, today cable incumbents continue to deny their competitors access to this valuable programming. Indeed, less than two months ago, in its comments on the proposed Comcast and Time Warner acquisition of Adelphia, DIRECTV reiterated that incumbent cable operators have increased their efforts to take advantage of the "terrestrial loophole" to deny or restrict MVPD access to regional programming.[53/] DIRECTV further explained that cable operators may now exploit their current position to obtain exclusive carriage agreements even with unaffiliated programmers.[54/] In addition, both DBS providers have recently claimed that cable-owned programmers have adopted coercive pricing practices, requiring competitors to pay several times more per subscriber for programming than what they charge cable operators.[55/]

Such anti-competitive practices by cable incumbents are likely to increase in both number and severity in light of imminent telco entry. Cable operators possess both the

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53/ *See* Comments of DIRECTV, Inc., filed in Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., MB Docket No. 05-192, July 21, 2005, at 13-26 ("DIRECTV Comments"). For example, DIRECTV notes that Comcast denies access to its Comcast SportsNet Philadelphia network by DBS operators. *Id.* at 16-17. Cox offers its Channel 4 San Diego only to cable operators. *Id.* at 17. In both cities, DIRECTV's market share is significantly lower than its national average. *Id.*; *see also* Comments of RCN Telecom Services, Inc., filed in Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Cable Inc., MB Docket No. 05-192, July 21, 2005, at 10-15 ("RCN Comments").

54/ For example, DIRECTV notes that Time Warner secured exclusive distribution rights to newly created Carolina Sports and Entertainment Television in Charlotte, precluding access by DBS competitors. DIRECTV Comments at 18.

55/ *See, e.g.*, Program Access Complaint, *Echostar Satellite L.L.C. v. In Demand, L.L.C.* (filed July 5, 2005); Program Access Complaint, *DIRECTV, Inc. v. In Demand, L.L.C.* (filed June 29, 2005); *see also* RCN Comments at 16-17.

ability and the incentive to preclude telcos from providing video programming at all. As DIRECTV recently explained:

> . . . as new entrants with no market share, the RBOCs are the most likely targets for abuse by dominant incumbents. . . . A cable operator with a regional monopoly would have the economic incentive to withhold affiliated [regional sports network] programming from an RBOC and would have to pay little compensation to an unaffiliated RSN to forgo the minimal affiliate and advertising revenues associated with the RBOC's relatively few subscribers.[56/]

Moreover, as noted above, findings by the GAO and the Commission demonstrate that market entry by terrestrially based MVPDs causes cable operators to reduce their prices. Given their efforts to erect barriers to telco competition altogether, there is every reason to expect that cable operators will seek to forestall or minimize the competitive threat by denying telcos the programming that is essential to their ability to compete in the first place.

In light of these circumstances, SBC shares DIRECTV's concerns. As a new entrant in the market for video services, SBC's success depends critically on access to quality programming. Regional programming, in particular, is becoming more and more highly demanded by video subscribers.[57/] The ability to deny or restrict access to such

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56/ DIRECTV Comments at 33-34.

57/ *See* Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2764 ¶ 15 (2005) ("Sports programming warrants special attention because of its widespread appeal and strategic significance for MVPDS. The *2004 Report* identifies at least 38 sports channels out of a total of 96 regional networks. Many of these networks are owned at least in part by MSOs. There are also 40 regional and local news networks that compete with local broadcast stations and national cable news networks. Many of these networks are owned at least in part by MSOs.").

programming on competitive rates, terms, and conditions is thus a potent weapon that incumbent cable companies can use to stifle competition.

Accordingly, SBC encourages the Commission to identify and implement ways of addressing this recognized and ongoing problem. As the Commission has noted, "the law of program access continues to be refined,"[58] and the Commission possesses a number of tools by which it can further that process. For example, in the Hughes/News Corp. proceeding, as the Notice indicates, the Commission established an expedited arbitration mechanism for aggrieved MVPDs that could not successfully negotiate terms for carriage of an RSN, and permitted the MVPD to continue to carry the RSN while the dispute was being resolved.[59] Given the continuing existence of such recognized problems, the Commission could initiate proceedings to explore whether it can and should adopt remedial schemes to promote video competition.

The Commission has ample authority to address the growing problem of incumbent cable operators preventing nondiscriminatory access to programming — the precise situation that led to the adoption of the program access provisions of the 1992 Cable Act. First, the Commission has "acknowledge[d] that there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under 628(b) as an unfair method of competition or deceptive practice if it precluded competitive

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58/ Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 ¶ 5 (1998) ("*Program Access Recon Order*").

59/ *See* Notice ¶ 18 n.13 (citing *Hughes/News Corp. Merger Order* ¶¶ 172-79).

MVPDs from providing satellite cable programming."[60] It should take steps to clarify the circumstances under which section 628(b) would afford a remedy for such migration.[61] Moreover, while section 628 mandates program access rules for satellite-delivered programming, nothing in the language or purpose of that section bars the Commission from adopting rules dealing with other types of programming.[62]

The Commission has other sources of authority as well. For example, section 616(a)(2) of the Act directs the Commission to adopt regulations of program carriage agreements, and to ensure that cable operators do not prevent "video programming vendors" from distributing programming to other MVPDs — regardless of the method of such distribution.[63] Cable operators that establish regional programming distributors designed to exploit the "terrestrial loophole," or which otherwise pressure video programming vendors to offer them exclusive access or preferential pricing, violate Congress's intent in section 616. Likewise, given the time that has elapsed since the Commission committed to monitor program access difficulties and the continued examples of difficulties of the kind cited by DIRECTV, further proceedings should make clear that

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60/ Memorandum Opinion and Order, *Echostar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802, 22807 ¶ 13 (2000). The Notice seeks comments (at ¶¶ 18-19) on the extent of such migration.

61/ Indeed, the Commission has previously pledged to "continue to monitor this issue [*i.e.*, the migration of programming from satellite to terrestrial delivery] and its impact on competition in the video marketplace." *Program Access Recon Order* ¶ 71.

62/ This is in contrast with the statute at issue in *MPAA v. FCC*, 309 F.2d 796 (D.C. Cir. 2002), where Congress required the Commission to adopt captioning rules and, in the next section, required it to write a report on video description rules. Congress in section 628 expressed no opinion on access to non-satellite programming, which formed the context of the abuses before it at the time.

63/ 47 U.S.C. § 616(a)(2).

the prohibition on coercion of any video programming vendor (satellite or otherwise) to grant exclusivity rights will be interpreted broadly to include any exercise of market power to deny or restrict access to programming.[64] While the Commission originally decided (in 1993) that it would not develop specific indicia of coercive behavior,[65] the ensuing twelve years have allowed the Commission to develop a far more comprehensive understanding of the program access problems arising from the current position of cable incumbents.

Preventing abuses in the program markets critical to competitive MVPDs is consistent with Congress's intent. Indeed, Congress clearly envisioned that the Commission would pursue other means to foster the development of video competition, stating its "expect[ation that] the Commission [will] address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies," and stating further that "the Commission shall encourage arrangements which promote the development of new technologies providing facilities-based competition to cable[.]"[66] The Commission should

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64/ *See* 47 C.F.R. § 76.1301(b).

65/ *See* Second Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2648 ¶ 14 (1993).

66/ H.R. Rep. No. 102-862, at 93 (1992) (Conf. Rep.); *see also* 47 U.S.C. § 157(a) (citing the "policy of the United States to encourage the provision of new technologies and services"). The decisions in *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002), and *American Library Assn v. FCC*, 406 F.3d 689 (D.C. Cir. 2005), do not bar the Commission from expanding its program access rules. In *American Library*, the court held that the Commission sought to exercise authority over an area entirely outside of its jurisdiction. By contrast, Congress specifically contemplated that the Commission would exercise authority over cable and MVPD competition in general, and program access and carriage agreements in particular. As noted above, unlike in *MPAA*, Congress never spoke to the initiate a proceeding to explore additional ways in which to enforce this mandate, and it should resolve that proceeding expeditiously so that these concerns that have been lingering for several years do not further impede the growth of video competition, particularly with the emergence of telco new entrants that the 1996 Act specifically sought to promote.[67]

Respectfully submitted,

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issue of impediments to access to non-satellite programming. Further, the rule invalidated in *MPAA* was a content-based regulation of speech. Nondiscriminatory program access rules could not be viewed as content-based.

[67] *See, e.g.*, H.R. CONF. REP. NO. 104-458, at 172, 177 (1996) (stating that the 1996 Act was intended to encourage competition in all markets, including specifically "[telephone company] entry" into video markets).